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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

A.F.EVANS COMPANY, INC., et al., Plaintiffs and Appellants, v. DOHENY-VIDOVICH PARTNERS et al., Defendants and Respondents.	A114813 (San Francisco County Super. Ct. No. 311053)

This is the third appeal in the course of protracted litigation related to a short-lived agreement to purchase and develop a parcel of land in San Francisco. Appellants and plaintiffs, A.F.Evans Company, Inc., (Evans) and Charmaine Curtis (Curtis) negotiated and consummated a partnership agreement with defendant Doheny-Vidovich Partners (DVP) through its general partner defendant John Vidovich (Vidovich) in June of 1999. This litigation commenced nine months later.

The procedural history of this matter is convoluted, to say the least, and involves the unusual circumstance of sequential trials with incongruent factual findings. Although plaintiffs' outcome was improved in the second trial, they nonetheless appeal, seeking a reversal of the judgment and a new trial. Plaintiffs, however, have not demonstrated they suffered any prejudicial error in the over nine-year course of the litigation. We therefore affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

In March 1998, Evans obtained an option to purchase a parcel of land at 8th and Townsend Streets (the property) for $8.2 million. In May 1999, plaintiffs began negotiating with Vidovich concerning the formation of a partnership to purchase and develop the property. In June 1999, plaintiffs obtained entitlements to build a 300,000 square-foot mixed use commercial/residential building on the property, which purportedly increased the property's value to $12.5 million. Shortly thereafter, the parties entered into a partnership agreement (the Agreement) to purchase, develop, and manage the property.

For purposes of this appeal, the essential terms of the Agreement were these: The general partners were Evans and DVP.[2] Evans's contributions to the partnership were the right to purchase the property, the payments made on the option, and the entitlements, all of which was valued in the Agreement at $500,000 net of reimbursements to be paid to Evans. DVP's contribution to the partnership was $5.5 million. Both general partners were to participate in the "control, management, and direction" of the partnership's business, and all major decisions required the approval of both general partners. "Major Decision" was a defined term that included a number of specified actions, the most relevant to this appeal being "construction contracts for in excess of $10,000 . . . ."

According to plaintiffs, as a condition of joining the partnership Vidovich insisted upon having the partnership act as the owner/builder, rather than hiring a general contractor, which, Vidovich stated, would result in substantial cost saving to the partnership. The Major Decision clause was therefore included in the Agreement because of the risks involved—i.e., the partnership, rather than a general contractor, would be responsible for any cost overruns due to increases in the cost of materials, failures of subcontractors, and the like. As explained by plaintiffs, the clause was a

[1] We limit our description of the issues in dispute and the case history to matters that are pertinent to the relatively narrow issues raised on appeal.

[2] The limited partners were Curtis, Evans, and DVP.

mechanism to ensure that the partners shared the decisionmaking with respect to costs. "It was a cost control provision."

As the project proceeded, conflicts developed between the parties, culminating in this action being filed in March 2000. The complaint sought dissolution of the partnership and damages for breach of contract. Plaintiffs' primary grievance was that Vidovich had agreed to manage the construction of the project, and that Vidovich and DVP had not carried out the tasks necessary to accomplish that responsibility, "demonstrat[ing] a total inability to function as the construction manager of the Project." These allegations were vigorously disputed by defendants.

In September 2000, DVP filed a cross-complaint against plaintiffs, pleading numerous causes of action and including allegations that plaintiffs breached the Agreement and their fiduciary duties by refusing to cooperate in the development of the property, by refusing to pay their share of the project costs, and by putting the project loan in default.[3]

In November 2000, plaintiffs filed a second amended complaint which repeated the allegations of the original complaint, and added to their breach of contract claim a notice of rescission of the partnership agreement. The second amended complaint also pleaded, inter alia, a cause of action for conversion (alleging Vidovich used partnership funds to pay employees for work done on other projects); a cause of action for fraud (including a claim that Vidovich fraudulently concealed the purchase of $750,000 worth of steel pilings with partnership funds for use in the partnership project and for a DVP project); a cause of action for breach of fiduciary duty; and a cause of action for dissolution of the partnership and an accounting.

[3] Most of the allegations in the cross-complaint related to provisions in the Agreement concerning a second property (the King Street property) on which Evans had option rights. Pursuant to those provisions, the parties agreed to create a second partnership for the acquisition and development of the King Street property. As will be explained, that portion of the cross-complaint relating to the King Street property was abated and, ultimately, litigated in a different action.

In the meantime defendants, exercising their rights under the agreement, petitioned the court to dissolve the partnership and liquidate its assets. This petition was granted in November 2000. The court appointed David Bradlow as the liquidator and authorized him to liquidate the partnership assets, to pay the partnership's debts, and to prepare an accounting; distribution of the liquidated assets, however, was not permitted so long as plaintiffs maintained their claim for rescission. The court also ordered that plaintiffs' cause of action for judicial dissolution and accounting be stayed; plaintiffs' other claims were allowed to proceed.

In April 2001, apparently in response to a motion filed by DVP "for clarification of various matters relating to the appointment of the liquidator," the court granted DVP's motion to permit the partners to credit bid the amount of their contributions to the partnership in offers to buy the property, and to permit the liquidator to take appropriate action to avoid foreclosure, but denied DVP's request to stay the trial pending completion of the liquidation. Specifically, the court ordered that "[a]ll causes of action except the 8th Cause of Action . . . for a dissolution and accounting may proceed to trial. Under the 8th Cause of Action, the Court retains jurisdiction over the final distribution of assets to the parties, and may adjust the distribution based upon its determination on the parties' remaining claims."

In July 2001, defendants filed a motion for summary adjudication of the first cause of action for rescission. Defendants presented evidence that there was never an agreement that Vidovich would act as construction manager and, in fact, the parties discussed this very issue during negotiations but could not agree on terms, so the proposed language that Vidovich would have "primary responsibility" over construction of the project was removed from the Agreement. Therefore, defendants argued, there was no breach of the partnership agreement for Vidovich's alleged failure competently to manage the construction activities.

Plaintiffs argued in opposition that the contract was not confined to the four corners of the document, but included separate oral agreements regarding the assignment of responsibilities between the general partners. Proof of an oral agreement regarding

how the partnership would be run would not violate the parol evidence rule, plaintiffs contended, because the Agreement was silent on that subject.

The court granted defendants' motion, concluding it was undisputed that defendants had not agreed to supply construction management services as part of the written partnership agreement, and therefore, at most, plaintiffs' evidence showed a separate and subsequent oral agreement by Vidovich to provide some level of construction management. Accordingly, the court ruled, "[w]hile the breach of any such separate agreement might give plaintiffs some legal rights, it cannot entitle them to rescind the June 30, 1999 agreement that formed the partnership in the first place."

Two weeks later, plaintiffs filed a motion to vacate, modify or reconsider the order. Plaintiffs argued that because the motion for summary adjudication had focused only on the rescission remedy and had ignored the damage remedy pleaded in the breach of contract cause of action, and because the court found there *was* evidence of a subsequent oral agreement, the order granting the motion eliminating the breach of contract cause of action in its entirety should be modified to clarify that plaintiffs are entitled to pursue damages for breach of the subsequent oral agreement. In the alternative, plaintiffs requested leave to amend their complaint to add such a cause of action.

The court denied the motion for reconsideration but granted leave to file an amended complaint "adding a cause of action for the breach by defendants of a contract formed after the parties' partnership." The court also reopened discovery.

In November 2001, plaintiffs filed the third amended complaint alleging that the parties' conversations before signing the partnership agreement and their conversations and conduct after entering into the partnership constituted an implied-in-fact contract "pursuant to which . . . Vidovich agreed to be responsible for the construction management of the Project . . . ." Plaintiffs then alleged the identical *factual* bases for

their new breach of contract claim as were alleged to support their previous breach of contract claim. [4]

Also in November 2001, the parties stipulated to a partial distribution of assets, by which DVP would receive the property and plaintiffs would receive approximately $1.2 million, less 10 percent to be held in reserve for an unadjudicated third party complaint in intervention.[5]

During the same month plaintiffs moved to abate prosecution of defendants' cross-complaint on the ground that another action was pending between the same parties on the same causes of action. [6]

In December 2001, on a motion by defendants, the trial date was continued to March 18, 2002. The parties, however, agreed to the appointment of Justice Edward A. Panelli (retired) as a temporary judge to try "this entire action" at the JAMS offices, such trial to be completed before March 18, 2002.

In January 2002, the court (Judge Robertson) ruled on plaintiffs' motion to abate the cross-complaint. The court stayed those portions of defendants' cross-complaint relating to the King Street property until the related action involving the same issues, then pending on appeal, either became final or was remanded for further proceedings.

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[4] As a result of a renumbering of the causes of action in the third amended complaint, the "Dissolution of Partnership and Accounting" claim became the seventh cause of action. Throughout the record, however, it is referred to as the eighth cause of action, as it was labeled in the second amended complaint. We shall also refer to it as the eighth cause of action.

[5] At some unknown time in the course of this litigation, William G. Rutland, Jr., LLC, and the Rutland Group (collectively Rutland) filed a complaint in intervention against plaintiffs asserting an equity interest in the property as compensation due for lobbying and consulting work on the 8th and Townsend entitlements.

[6] In March 2000, DVP had filed a separate action against Evans relating only to that portion of the partnership agreement in which the partners agreed to form a second partnership to purchase and develop the King Street property. As of November 2001, Evans had prevailed in that action on a motion for summary judgment and the case was on appeal. (*Doheny-Vidovich Partners v. A.F.Evans Co., Inc.* (A093348, Sept. 16, 2002) [nonpub. opn.].)

Plaintiffs' request to stay prosecution of the remaining allegations, pertaining to the 8th and Townsend property, was denied.

The parties filed trial briefs in January 2002 and proceeded to trial with Justice Panelli presiding. The trial took place over a period of two weeks in February 2002. In this trial, the parties focused primarily on the issue of whether DVP and Vidovich had agreed to act as construction manager for the project, and whether they had failed to do so.

Near the close of trial, plaintiffs made a motion for leave to file a fourth amended complaint to conform to proof. Specifically, they requested leave to dismiss the cause of action for conversion and to add a cause of action for breach of the written partnership agreement. The new cause of action alleged five specific breaches, among them that DVP breached the Major Decision clause by purchasing steel pilings without plaintiffs' approval. According to plaintiffs, defendants would suffer no prejudice from the amendment because "[a]ll of the conceivable evidence relating to these issue[s] has been introduced at trial."

Prior to issuing a decision or ruling, Justice Panelli held a hearing on procedural matters. He asked the parties to "think about what I can do here as to how to effect a final judgment, because there is still the eight[h] cause of action [for dissolution of the partnership and accounting]." His concern, as expressed, was that he was unable to enter a judgment because of the one final judgment rule. There was a lengthy colloquy regarding how the matter should proceed, with plaintiffs' counsel suggesting that Justice Panelli decide the eighth cause of action, since the liquidator had completed nearly all of his work, and Justice Panelli had "heard the evidence." Defense counsel suggested that the claims be severed, but plaintiffs' counsel indicated he had "no desire to go through another trial restricted to the eight[h] cause of action." No agreement was reached at the hearing; Justice Panelli asked counsel to "think about it," and stated that he would not take the matter under submission until he learned "what you folks are going to agree upon."

The parties never agreed upon a mechanism for resolving this issue, but Justice Panelli did issue a decision on March 14, 2002, presumably in the face of the March 18 deadline for completion of the trial. The decision found for defendants on all of plaintiffs' claims, and found for plaintiffs on defendants' cross-complaint. As relevant to this appeal, Justice Panelli found that plaintiffs had not proven an implied-in-fact agreement that Vidovich would serve as the construction manager of the project, and that plaintiffs had not proven fraudulent concealment of the order for the steel pilings, instead finding, on conflicting evidence, that plaintiffs' agent was aware of the order and had not objected to it. Justice Panelli also denied plaintiffs' motion to amend the complaint to conform to proof, finding that "the allegations of the proposed amendment had not been proven by a preponderance of the evidence and hence any amendment would be an idle and useless act."

On March 15, 2002, Justice Panelli's "Consent of Pro Tem Judge/Oath of Office" was filed. The signature under the oath was dated February 28, 2002, and it was "subscribed and sworn" by the administering judge on March 5, 2002.

There followed nearly four and one-half years of legal skirmishing, which we review here only briefly. Specific proceedings relevant to the issues raised on appeal will be discussed in detail in connection with our analyses of those issues.

In March 2002, plaintiffs filed objections to the statement of decision and argued that Justice Panelli's decision was invalid because he did not try the "entire action" as specified in the order of reference, and he did not sign the order of reference as required by California Rules of Court, former rule 244.1 (currently rule 3.900 et seq.).[7] Plaintiffs also challenged all of the findings and most of the reasoning contained in the statement of

[7] Plaintiffs erroneously relied upon California Rules of Court, former rule 244.1, which applied to references, instead of former rule 244 (now rule 2.831) which applied to appointments of pro tempore judges.

All further references to rules are to the California Rules of Court in effect in 2002.

decision contending, inter alia, there was no evidence to support Justice Panelli's findings. Plaintiffs' objections were presumably overruled.

Plaintiffs also filed a request to have the entire case assigned for trial. They contended, again, that the reference to Justice Panelli was "fatally flawed by non-compliance with Rule 244.1" because Justice Panelli failed to sign the reference order, and because the reference order required Justice Panelli to decide "the entire action" yet he refused to hear the eighth cause of action.

Defendants, for their part, filed a brief re trial status. They argued that the reference for a trial of "this entire action" did not—and could not—encompass any of the causes of action that had been stayed, i.e., plaintiffs' eighth cause of action and defendants' claims in the cross-complaint pertaining to the King Street property. Defendants also accused plaintiffs of "[g]amesmanship" in seeking a "second bite at the apple" by refusing to cooperate in resolving the very procedural issues of which plaintiffs now complained.[8]

Apparently, plaintiffs filed a supplemental brief on June 7, 2002, challenging the validity of the statement of decision on the additional ground that Justice Panelli lacked jurisdiction to conduct the trial because no oath of office was appended to the order appointing him as the judge pro tempore.

Additional supplemental briefing on these issues was submitted by the parties after a hearing before the trial court (Judge Quidachay). Defendants argued that the absence of an oath did not invalidate the proceedings, that Justice Panelli did try the "entire action" (i.e., all the claims that were not the subject of a stay order), and that in any event, plaintiffs waived any irregularities by actively participating in the proceedings despite the claimed deficiencies. Plaintiffs reiterated their position that the absence of an oath is jurisdictional and not waivable.

Many months later, in December 2002, plaintiffs filed additional briefing relating to this motion. No ruling, however, was ever issued. According to plaintiffs, counsel

[8] The details of this alleged gamesmanship are described, *post*, at pages 30-31.

inquired in January 2003 when the court might be expected to decide the matter. Counsel was told that Judge Quidachay had declined to rule on procedural grounds.

In the meantime, on April 30, 2002, the liquidator filed his submission of accounting. On May 10, plaintiffs filed their objections to the accounting. In August, plaintiffs filed a petition to vacate the liquidator's submission of accounting, to which defendants filed a responsive pleading. In September, the liquidator filed his final report and award, and in October defendants filed a petition to confirm arbitration award. Plaintiffs opposed defendants' petition to confirm the award, arguing that the liquidator was not an arbitrator but served only an accounting function and, therefore, plaintiffs were entitled to a full court hearing on the accounting issues. The court (Judge McBride) agreed, ruling that the liquidator's report did not constitute an arbitration award and that plaintiffs' eighth cause of action should be considered together with the liquidator's report. In February 2003, defendants appealed from this order. (*A.F.Evans Co., Inc. v. Doheny-Vidovich Partners* (Apr. 16, 2004, A101660) [nonpub. opn.] (*A.F.Evans*).)

Shortly thereafter, having learned in January 2003 that Judge Quidachay declined to rule on the pending request for assignment for trial, plaintiffs filed a motion to vacate the statements of decision and to set case for trial,[9] making essentially the same arguments that were made in the prior, unresolved request for trial setting. Defendants opposed the motion on the same grounds they had opposed the previous request.

In March 2003, the trial court (Judge Quidachay) denied plaintiffs' motion finding, among other things, that the manner and timing of the filing of Justice Panelli's oath did not violate constitutional requirements and, in any event, "any jurisdictional challenge was waived" because " '[a]n attorney may not sit back, fully participate in a trial and then claim that the court was without jurisdiction on receiving a result unfavorable to him.' [Quoting *Estate of Fain* (1999) 75 Cal.App.4th 973, 989 (*Fain*).]"

At this point litigation activity in this case was suspended for a period of about 15 months, presumably because (1) the denial of defendants' petition to confirm the

[9] The motion was to vacate two decisions by Justice Panelli—the decision under review in this appeal and the decision on Rutland's complaint in intervention.

arbitration award was pending on appeal, and (2) the parties were otherwise occupied with preparing for and conducting the trial on defendants' action concerning the King Street property, which trial began in March 2004 and resulted in a verdict in favor of defendants in May.

In April 2004, we issued our opinion, affirming the trial court's denial of defendants' petition to confirm the arbitration award, concluding that the liquidator's actions were not in the nature of an arbitration. (*A.F.Evans, supra*, at p. 1.)

In July 2004, plaintiffs filed a motion to set a trial for the eighth cause of action. Defendants opposed the motion arguing that the liquidator was acting as a referee and the matter should be heard on the law and motion calendar under Code of Civil Procedure[10] section 644. Defendants then filed a competing motion for an order confirming the referee's report. There ensued extensive additional briefing on the two motions, and a request for sanctions against defendant for filing a frivolous motion.

The court (Judge Dondero) granted plaintiffs' motion to set the matter for trial. The court (Judge Warren) denied defendants' motion to confirm the liquidator's report. Judge Warren ruled that the liquidator was appointed only to perform the duties set forth in the partnership agreement (to prepare an accounting, pay debts, and distribute assets) and was not appointed to decide the eighth cause of action or to decide issues of contract interpretation and law "that cannot be constitutionally delegated to a referee under Section 639." Plaintiffs' request for sanctions was also denied.

Trial on the eighth cause of action was scheduled to begin in November 2004. At that time, plaintiffs filed two motions in limine. The first was a motion to vacate Justice Panelli's statements of decision, on essentially the same grounds as plaintiffs' previous motions to vacate the statements of decision and set the matter for trial. The second motion asked the court to exclude Justice Panelli's finding on the fraud cause of action insofar as it pertained to the issue of the steel purchase. Defendants, for their part, moved to bar plaintiffs from introducing any evidence or argument that defendants were

[10] All subsequent statutory references are to the Code of Civil Procedure.

negligent, converted partnership property, breached contractual duties, committed fraud, or breached fiduciary duties, because these claims were all adjudicated in the first trial before Justice Panelli.

In opposition to plaintiffs' first motion in limine, defendants argued, inter alia, that plaintiffs waived the claim the entire case should be heard by Justice Panelli because plaintiffs never sought to have the eighth cause of action assigned to Justice Panelli.

In opposition to defendants' motion in limine plaintiffs argued for the first time that they had a due process right to have a single judge adjudicate all causes of action.

The court (Judge Ballati) ordered that the trial of the eighth cause of action be assigned to Justice Panelli. The court reasoned, "Justice Panelli was appointed by this Court to sit as a temporary judge pursuant to California Rules of Court[, rule] 244 to try the entire action . . . . This Court interprets that Order as permitting the assignment of the Eighth Cause of Action to Justice Panelli at this time. [¶] . . . In the event that Justice Panelli is not available to preside over the trial of the matters assigned by this Order, the parties are ordered to return to this Court for further proceedings . . . ."

Justice Panelli, however, declined the appointment. In a letter to the court dated February 10, 2005, he explained his reasons: "My recollection is that the Eighth Cause of Action had been [bifurcated] or severed and accordingly, while I heard and decided the bulk of the dispute, and issued my intended decision with respect thereto, I declined to address the judicial accounting and dissolution. My reasons for the declination are unclear at this time but I think they had something to do with what Judge David Garcia had retained of the case or the fact that there was a stay on the Eighth Cause of Action. In any event, I had nothing further to do with this matter as I awaited a resolution of the remaining Eighth Cause of Action so that a judgment could be entered based on my decision. However, following my decision, adverse to plaintiffs, the case took some unusual twists of which I am sure you are aware. . . . [¶] In light of the history of this matter, I am not inclined to accept the assignment to try the Eight[h] Cause of Action."

The court then convened a status conference. Prior to the conference plaintiffs filed a status conference statement in which they argued that plaintiffs had a due process

right to have a single judge adjudicate all causes of action, and because Justice Panelli was unavailable, the court should declare a mistrial and set the entire case for trial. In their status conference statement, defendants argued, among other things, that plaintiffs had not demonstrated Justice Panelli was unavailable, and that the request for mistrial was inconsistent with plaintiffs' previously stated positions that Justice Panelli was disqualified from further involvement in the case because his appointment had expired on March 18, 2002.

At the status conference, the parties agreed that Justice Panelli's disinclination to accept the appointment was sufficiently ambiguous to require clarification. A follow-up letter was sent asking whether Justice Panelli would try the eighth cause of action. In response, he unequivocally declined to accept the assignment.

At a subsequent hearing, the parties reargued their positions: Plaintiffs contended the "single judge" rule required the court to declare a mistrial in order that all of plaintiffs' claims could be decided by one judge; defendants contended the mistrial motion was untimely, waived, and procedurally improper. In July 2005, the court issued its rulings. It denied plaintiffs' motion to vacate Justice Panelli's statements of decision, denied plaintiffs' motion for mistrial, granted defendants' motion to preclude retrial of issues decided by Justice Panelli, and ordered counsel to appear to set the matter for trial.

The eighth cause of action was tried to the court over eight days in October, November, and December of 2005. The court issued its statement of decision in April 2006, finding that Vidovich had engaged in "unauthorized conduct" by purchasing the steel pilings, and ordered defendants to return $165,685.15 to the partnership. The court also found that defendants improperly charged to the partnership work done on a DVP project that had been performed by a partnership employee. On this account, defendants were ordered to return $11,927.50 to the partnership. The court rejected plaintiffs' claim that they were entitled to a rescission of the partnership based upon defendants' breaches of the agreement, thus also rejecting plaintiffs' proposed recalculation of their contribution to the partnership based upon the value of the property when it was contributed to the partnership ($4.3 million) rather than upon the value of plaintiffs'

contribution to the partnership as stated in the agreement ($500,000). The court concluded rescission is not a remedy available in an accounting cause of action.

Judgment was entered in May 2006, and this appeal followed.

II. DISCUSSION

A. Plaintiffs Agreed to a Bifurcated Proceeding and Therefore the Single Judge Rule Does Not Apply

Plaintiffs contend they are entitled to a new trial on all causes of action, because they have a due process right to have a single judge adjudicate all issues, and they neither waived that right nor agreed to defer the accounting cause of action for separate adjudication.

1. Legal Framework and Plaintiffs' Contentions

"The law has long been settled that in a civil action '[a] party litigant is entitled to a decision upon the facts of his case from the judge who hears the evidence . . . . He cannot be compelled to accept a decision upon the facts from another judge . . . .' [Citations.] Where there has been an interlocutory judgment rendered by one judge, and that judge then becomes unavailable to decide the remainder of the case, a successor judge is obliged to hear the evidence and make his or her own decision on all issues, including those that had been tried before the first judge, unless the parties stipulate otherwise. [Citation.] . . . It is considered a denial of due process for a new judge to render a final judgment without having heard all of the evidence." (*European Beverage, Inc. v. Superior Court* (1996) 43 Cal.App.4th 1211, 1214 (*European Beverage*); see also *Rose v. Boydston* (1981) 122 Cal.App.3d 92, 97 (*Rose*).)

Plaintiffs insist that the language of the stipulation required Justice Panelli to try the "entire action." They deny any understanding or agreement that Justice Panelli could decide less than the entire action or that they waived their due process right to a single judge. Plaintiffs further contend that, as a result of Justice Panelli's "refus[al]" to hear the accounting cause of action, they were seriously prejudiced because Justice Panelli excluded evidence relevant to the accounting cause of action that would also have been

relevant, indeed critical, to plaintiffs' other claims. We conclude the record does not support these contentions.

2. The Parties' Understanding of the Stipulation and Order

Plaintiffs point to the stipulation and order assigning the matter to a judge pro tempore, to support their claim that they always understood and agreed that all causes of action would be tried together, and no cause of action had been carved out. It is true the stipulation and order states that "this entire action shall be tried before Justice Edward A. Panelli . . . ." But that is only the beginning of the inquiry. As defendants point out, the stipulation and order must be read in the context of the matter's procedural posture at the time the order was issued, and it is undisputed that the stipulation was entered into when the accounting cause of action was subject to stay orders.

Further, where, as here, there is a dispute concerning the interpretation of an agreement, it is instructive to focus on evidence that tends to show the parties' understanding *before* the dispute arose. (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 983; *Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal.App.4th 1441, 1449.) After reviewing that evidence, we conclude the statements and comments made preceding and immediately after the JAMS trial persuasively demonstrate it was the parties' understanding that Justice Panelli would adjudicate the entire action except for the eighth cause of action, which was stayed and would be decided at a later time by the court.[11]

a. Justice Panelli Did Not Refuse *to Try the Accounting Cause of Action; the Parties Agreed It Was Not Before Him*

On the first day of proceedings before Justice Panelli, defendants moved in limine to exclude evidence regarding any matters decided by the liquidator, including his determination with respect to the purchase of the steel pilings. Defendants argued the

[11] Plaintiffs do not dispute that portions of defendants' cross-complaint were excluded from adjudication in the first trial, also due to a stay order. Plaintiffs contend, however, that this fact is "irrelevant" because that stay order was issued after the order of reference.

liquidation was a private arbitration.[12] In opposition, plaintiffs' counsel pointed out that the liquidator had not made any adjudicatory decisions because the court had expressly reserved jurisdiction to decide any issues arising out of the distribution of the partnership's assets, i.e., the eighth cause of action, based on a determination of the parties' remaining claims, and that the liquidator's work involved "purely accounting issues." Plaintiffs' counsel further pointed out that the liquidator had taken no sworn testimony and had held no evidentiary proceedings. Counsel hastened to add, however, that "plaintiffs do not intend to contest his accounting function of what pieces of paper submitted to him showed. But plaintiffs do want to and intend to prove that the ordering of the steel by Mr. Vidovich without any prior approval by A.F. Evans was a breach of fiduciary duty, and that breach of fiduciary duty claim is not adjudicated at all. It wasn't even . . . referred to Mr. Bradlow [the liquidator]."

At this point, Justice Panelli sought to clarify the scope of the issues to be decided at the trial before him. "Now, this is what confused me. If you'll look at Judge Garcia's order of April 18th, . . . it says, 'It's further ordered that the motion for stay of trial pending completion of Mr. Bradlow's liquidation efforts is denied.' So [Judge Garcia] is denying the stay of trial pending his liquidation efforts. [¶] 'All causes of action, *except the 8th cause of action* in the plaintiffs' second amended complaint for dissolution [and] accounting may proceed to trial,' *okay, which is what we're doing now*. Under the 8th cause of action, 'The Court retains jurisdiction over the final distribution of assets to the parties, and may adjust the distribution based upon its determination of the parties' remaining claims.' [¶] So on the one hand, [Judge Garcia] says that the cause[s] of action, all of them may proceed except the 8th and *he's retaining jurisdiction on the 8th*. And . . . it seems to me that what [Judge Garcia] is saying is he's going to wait to see until he gets a final determination from the liquidator and then he will make some decision with respect to either approving or disapproving this account. [¶] [Plaintiffs'

[12] At this point in the tortured path of this litigation the question of whether or not the liquidation process was an "arbitration" had not yet been decided, either by the trial court or by this court.

counsel]: *That's correct, Your Honor*. [¶] Justice Panelli: *So it doesn't seem that's before me*." (Italics added.)

Plaintiffs' counsel did not take issue with Justice Panelli's interpretation of the stay order, nor did he disagree with Justice Panelli's conclusion that the eighth cause of action was not before him. Rather, plaintiffs' counsel sought to convince Justice Panelli that a change in circumstances provided an *opportunity* for all causes of action to be determined in the JAMS trial. Counsel explained to Justice Panelli that the stay order had been issued in April of 2001, when a trial was anticipated in October, but the trial was delayed to February of 2002, and the liquidator had by then completed his work, "so at this time, there certainly is no reason to delay further the final adjudication of the 8th cause of action. Plainly, Judge Garcia is saying the 8th cause of action, *the Court* is going to adjudicate the remaining issues in that cause of action when the liquidator is finished. Well, the liquidator is now finished. [¶] . . . [¶] It would be an *extraordinary inefficiency* for us to delay to some further date a judicial resolution of the few remaining issues that remain." (Italics added.)

Plaintiffs' counsel then went on to explain that he would not insist upon introducing evidence regarding the eighth cause of action, but only wanted to ensure that evidence relating to the breach of fiduciary duty claim—which may affect how the accounting was calculated—would be admitted at the JAMS trial: "[P]laintiffs have absolutely no intention of questioning the accounting aspects of what the liquidator has done. [¶] But the plaintiffs do intend to introduce evidence to the extent regarding the process of decision making, for example, on the steel [purchase] and whether that was a breach of fiduciary duty by Mr. Vidovich and also whether Mr. Vidovich improperly surcharged the partnership on expenses that he incurred relating to this project, and the propriety of those surcharges was not before the liquidator." There ensued a discussion of what issues were or were not decided by the liquidator. Ultimately, however, plaintiffs' position was clarified as follows: "We're not seeking to question any witnesses, including the liquidator, about the accounting that's stated therein. And to the extent it helps us deal with this issue, *we don't want to admit or offer any evidence under*

that 8th cause of action directly, Your Honor. We're quite satisfied with offering evidence under the breach of fiduciary duty cause of action because that plainly is a cause of action before this Court. [¶] Justice Panelli: That clearly is." (Italics added.)

The record thus refutes plaintiffs' assertion that Justice Panelli "refused to try Plaintiffs' Eighth Cause of Action." More to the point, the colloquy leaves no doubt as to plaintiffs' understanding of the stipulation at the time of trial, which was that the JAMS trial would include all causes of action *except* the accounting claim, which would be decided by the *trial court* after adjudication of the other causes of action and after completion of the liquidator's work.[13]

b. Plaintiffs Did Not Assert at the Posttrial Hearing a Due Process Right to Have the Entire Action Decided by Justice Panelli

After the close of the trial, but before Justice Panelli issued his decision, a hearing was held on procedural issues. Plaintiffs rely on the transcript of that hearing to support their argument that Justice Panelli "refused" to adjudicate the eighth cause of action, and as proof that plaintiffs at that time "asserted their due process right to have the entire action heard and decided by one judge." Again, the cited transcript does not bear out plaintiffs' arguments.

At the posttrial hearing, Justice Panelli asked the parties for their views on how to proceed to judgment, in light of the unadjudicated eighth cause of action, the unadjudicated portions of the cross-complaint, and the one form of judgment rule. Justice Panelli offered, as one proposal, that the stipulation be treated as a reference, such that his decision would constitute a recommendation to the court, which the court could accept or reject. Plaintiffs objected, stating, "I don't think that is the intent of the parties,

[13] In support of their claim that they always understood the JAMS trial would include the eighth cause of action, plaintiffs point to their trial brief, submitted to Justice Panelli, in which they argued they were entitled to a decree of dissolution and a final accounting "based on the matters that will be proved at trial." That argument, however, is not inconsistent with our conclusion that plaintiffs understood the eighth cause of action was stayed, but hoped to convince Justice Panelli to proceed with its adjudication as a matter of judicial economy.

or certainly not our desire, your Honor." To which the judge responded, "I don't know what to do. I can't enter a judgment."

Plaintiffs' counsel then said: "Can I make a suggestion. I think our procedural posture has arisen as a result of a rather complicated sequence of events . . . ." Counsel went on to explain, "at the time that the court entered its order regarding the appointment of the liquidator. . . . in December of 2000, . . . there was a trial date of March . . . of 2001. So everybody saw the possibility of a trial going forward before the liquidator had sold the property; and so that is the reason why *the eighth cause of action was carved out at that time. Everybody said, all right, we got to let the liquidator finish, but we are having the trial in March of 2001. So, therefore, we can't try the eight[h] cause of action*. [¶] Then events changed all that. The Rutland Group came and made a motion to intervene. The trial date got kicked off and now the liquidator has finished. *And perhaps due to the unintention [sic] of counsel, we didn't clarify that point, that now there is a need, as your Honor just said, that we need to wrap up the whole package*. [¶] . . . [¶] . . . [The liquidator could] in a matter of days . . . make a final accounting to the Court. The important part is your Honor has heard the evidence, and so the reservation which was made in one of these orders, and it's . . . most clearly stated in the April 18 order by Judge Garcia, *is that the Court said under the eight[h] cause of action the court retains jurisdiction over the final distribution of assets to the parties*, and may adjust the distribution based on its determination of the parties' remaining claim[s]." (Italics added.)

Responding, Justice Panelli stated, "[i]t seems to me that someone is going to have to supervise what the liquidator does, unless you people agree that whatever is reported is going to be accepted; but I kind of heard that that isn't the case. But the other complicating factor is a cross-complaint that is . . . part of this lawsuit, and I haven't signed on to do the cross-complaint." After additional discussion regarding other options, defendants' counsel proposed that the parties stipulate to a severance, leaving the eighth cause of action as a "separate claim," to which plaintiffs' counsel replied, "I have

no desire to go through another trial restricted to the eight[h] cause of action."[14] At the close of the hearing, Justice Panelli asked counsel to "think about it," stating he was concerned about the one final judgment rule, because he was "only deciding part of [the case]."

It is plain the record does not support plaintiffs' contentions that, at the posttrial hearing, Justice Panelli "refused" to adjudicate the eighth cause of action or that plaintiffs asserted a *due process* right to have all causes of action decided by a single judge. At best, plaintiffs contended that it would be more convenient and desirable to go ahead and "wrap up the whole package" because Justice Panelli had "heard the evidence." Plaintiffs objected to an actual severance of the eighth cause of action, stating plaintiffs had "no desire" to go through a separate trial, but counsel did not assert any due process right to have all causes of action heard and decided by a single judge. In fact, plaintiffs' counsel expressed his understanding that "under the eight[h] cause of action *the court* retains jurisdiction over the final distribution of assets . . . ." (Italics added.)

3. Legal Analysis

Plaintiffs cite to numerous cases supporting the due process right to have the same judge adjudicate all issues, and emphasize that many are similar to this action in that the trials were bifurcated, leaving an accounting action to be tried separately. (*Rose, supra,* 122 Cal.App.3d at pp. 94-95; *David v. Goodman* (1952) 114 Cal.App.2d 571, 572; *Lacey v. Bertone* (1952) 109 Cal.App.2d 107, 108; *Western Oil etc. Co. v. Venago Oil Corp.* (1933) 218 Cal. 733, 746-747.) We agree that there is a due process right to have all claims determined by a single judge. But it is also clear that the parties to an action can stipulate to have a judge decide fewer than all causes of action, as occurred here. As stated in *European Beverage, supra,* 43 Cal.App.4th at page 1214, the single judge rule applies "unless the parties stipulate otherwise." Here, plaintiffs' counsel's statements and

[14] In their opening brief plaintiffs remove this sentence from its context and characterize it as "Plaintiffs' counsel again rais[ing] Plaintiffs' objection to Justice Panelli's refusal to try the Eighth Cause of Action." This is, at best, a tortured reading of the record.

conduct prior to and after the JAMS trial evinced a clear understanding that their stipulation to a trial by a judge pro tempore of the "entire action" excluded the eighth cause of action, which was stayed by court order, and which would be decided by the court after plaintiffs' other claims were adjudicated.

Plaintiffs try to avoid this result by contending that because the single judge rule "is not violated until the second phase of a bifurcated trial begins before a second judge," there can be no waiver of that right until commencement of the second trial. Plaintiffs argue they "asserted their due process right to have the entire action heard and decided by one judge on multiple occasions . . . . [and t]he procedural facts of this case cannot possibly be construed to support a conclusion that Plaintiffs 'intentionally relinquished' this due process right."

Both of these contentions are belied by the record. As we have already discussed, plaintiffs never asserted, either before, during, or immediately after the JAMS trial, any right to have a single judge—in this case Justice Panelli—adjudicate all causes of action. The first day of trial plaintiffs' counsel expressly affirmed Justice Panelli's understanding of the April 19, 2001, order that the court, and not Justice Panelli, would be "mak[ing] some decision with respect to either approving or disapproving this account[ing]." All parties and the judge then proceeded to trial with this understanding. Although plaintiffs *requested* that the accounting cause of action be included in Justice Panelli's adjudication, they never contended, during the entire course of the JAMS proceedings, that Justice Panelli's decision would be subject to attack as contrary to the stipulation or contrary to plaintiffs' due process rights unless he also decided the eighth cause of action. And, in the year following the JAMS trial, plaintiffs made no attempts to have the remaining cause of action tried by Justice Panelli; to the contrary, their repeated requests were to vacate Justice Panelli's decision as unauthorized, and to have a new trial on all causes of action.[15]

[15] Plaintiffs' due process claim was not raised until more than two and one-half years after the JAMS trial was completed.

In sum, the record shows that plaintiffs agreed in advance to a trial by Justice Panelli of fewer than all of the causes of action. Prior to the issuance of Justice Panelli's decision on the merits, plaintiffs never interposed any legal objection to Justice Panelli's adjudicating less than the "entire action," and never contended that Justice Panelli must, as a matter of due process or stipulation of the parties, decide all of the causes of action. Plaintiffs cannot now be heard to claim they never agreed to have Justice Panelli decide less than the entire action.[16]

The same evidence also supports a conclusion that plaintiffs waived any due process rights they did not assert in a timely manner. In *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 371 (*Civil Service Employees*), the defendant in a class action lawsuit contended that its due process rights were violated when the trial court granted a partial summary judgment on the merits in plaintiff's favor before absent class members had been notified.[17] The defendant "did not object to the trial court's entertainment of the motion prior to class certification but instead simply contested the motion on the merits . . . ." (*Id.* at p. 373.) It was not until "defendant's argument on the merits had been rejected [that] defendant complain[ed] of the procedural posture of the case and raise[d] the due process argument . . . ." (*Ibid.*) The Supreme Court concluded that "[u]nder these circumstances, . . . defendant waived whatever due process rights it

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[16] Plaintiffs have previously taken inconsistent positions on this issue. In 2002, plaintiffs' counsel averred that *on the first day of trial* "Justice Panelli stated that he did not want to be involved in any adjudication of such accounting matters [and that] [h]e would leave that judicial review to someone else." Plaintiffs' counsel stated he was "rather astounded, but did not see any way to deal with the situation if he was refusing to adjudicate those issues." Two years later, plaintiffs argued, "it is absolutely impossible in this case to find that [plaintiffs] intended to waive [their] right to a single-judge trial of all of [their] causes of action because [plaintiffs] had *no way to know until the very last day of the proceedings* before Retired Justice Panelli that [he] would refuse to try the 8th Cause of Action." (Italics added.)

[17] " '[A] defendant in a class action has a due process right to secure a determination of the issues relating to the suitability of the action as a class matter as well as the composition of the class and the form of notice to the members, prior to determination of the merits of the action.' " (*Civil Service Employees, supra*, 22 Cal.3d at p. 372.)

may have had to object to the court's resolution of the partial summary judgment motion prior to class notification." (*Ibid.*)

Similarly, here, plaintiffs waived whatever due process rights they had to object to Justice Panelli's adjudication of fewer than all plaintiffs' claims at trial. "Having chosen to submit the issue[s] to the trial court on the merits, [plaintiffs] can hardly claim that it is 'fundamentally unfair' in a due process sense to accord the trial court's decision binding effect." (*Civil Service Employees, supra*, 22 Cal.3d at p. 374.)

4. Plaintiffs' Claim of Prejudice Is Not Supported in the Record

We have determined the trial court did not err in rejecting plaintiffs' due process claim that they were entitled to adjudication of all causes of action by a single judge. We also reject plaintiffs' contention that this procedure resulted in prejudice.

Plaintiffs argue that they suffered "tremendous prejudice" due to the alleged violation of the single judge rule because, in the JAMS trial, they were "precluded from introducing accounting evidence regarding defendants' purchase of $750,000 of steel pilings and [evidence of] their payments to [a DVP] employee [Mr. Hooks] with partnership funds." Their case was severely prejudiced, they argue, by Justice Panelli's refusal to hear "all the evidence about the steel purchase or any of the evidence about the payments to Mr. Hooks," which evidence was "essential to Plaintiffs' claims of breach of fiduciary duty, fraud and breach of the partnership agreement." Plaintiffs argue that in the second trial, "in marked contrast," the judge heard all of the evidence regarding the steel purchase and "saw many documents not submitted in the first trial," and on the basis of this "much more complete record" the court concluded that defendants' purchase of the steel pilings and certain payments to Hooks violated the partnership agreement, resulting in the court ordering that $177,612.65 be restored to the partnership. Plaintiffs contend, in sum, that they suffered prejudice because "had Judge Ballati completed a trial of all of Plaintiffs' claims, he would [not] have come to the same conclusions as Justice Panelli."

This contention is remarkable for its utter lack of record support. Plaintiffs' briefs contain *no* citation to the record where evidence was offered by plaintiff and excluded by

Justice Panelli in the first trial.[18] Our own close review of that transcript has not uncovered a single instance of Justice Panelli's excluding any evidence offered by plaintiffs on these issues. Indeed, the entire argument appears to be a post hoc invention. Plaintiffs raised no contention predicated on exclusion of evidence during the posttrial hearing, or in their objections to the statement of decision. More to the point, in plaintiffs' motion for leave to file a fourth amended complaint to conform to proof, submitted near the close of the JAMS trial, plaintiffs asserted that "[t]he evidence relating to [the] allegation[that defendants violated the Agreement by purchasing the steel pilings] all has been introduced exhaustively by the parties as a result of Plaintiffs' first cause of action . . . . All of the conceivable evidence relating to [this] issue has been introduced at trial." Plaintiffs' own assertions thus contradict their claim on appeal, that they were prejudiced by violation of the single judge rule due to the exclusion of evidence in the JAMS trial. Neither prejudice nor error has been demonstrated.[19]

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[18] Plaintiffs cite to their counsel's declarations, filed in the trial court, as evidence demonstrating that Justice Panelli refused to hear any accounting evidence. All of the declarations state: "Shortly after the proceedings began . . . on February 4, 2002, [counsel] started questioning a witness about certain checks and other accounting documents. At a break a few minutes later, Justice Panelli stated that he did not want to be involved in any adjudication of such accounting matters. He would leave that judicial review to someone else. I was rather astounded, but did not see any way to deal with the situation if he was refusing to adjudicate those issues." The declaration contains no citations to the record to support this statement, and our reading of the February 4 transcript reveals no such evidentiary ruling.

[19] In response to a request from this court that plaintiffs provide citations to the record to support their arguments that relevant evidence was excluded, plaintiffs advised the transcripts for three days of JAMS proceedings "were never located." This circumstance does not relieve plaintiffs of the responsibility to provide those portions of the record that support their contentions on appeal. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.)

B. Technical Defects in the Paperwork for the JAMS Trial Do Not Invalidate Those Proceedings and, in Any Event, Such Defects Were Waived

Plaintiffs next contend that Justice Panelli lacked jurisdiction to conduct the trial and issue a decision because (1) the stipulation and order required that he try "this entire action" and he failed to do so, and (2) he did not timely take an oath of office.

1. Standard of Review

Procedurally, this issue comes to us on the denial of a "mo[tion] pursuant to Section 657 . . . to vacate the Statements of Decisions issued by former Justice Panelli . . . on the grounds that Justice Panelli lacked jurisdiction to conduct a trial of this case . . . ." Plaintiffs raised the issue again as grounds for a motion in limine prior to the trial on the accounting cause of action. On appeal, we review a ruling on a motion in limine for abuse of discretion. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493.) We also review a trial court's decision pursuant to section 657, denying a motion for new trial, for abuse of discretion; but in doing so, we must examine the entire record to make an independent assessment of whether there were grounds for granting the motion. (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.)

The trial court's factual findings are reviewed under the substantial evidence standard. Where the evidence consists of written declarations, the rule on appeal is that those declarations supporting the contentions of the prevailing party "establish not only the facts stated therein but also facts which reasonably may be inferred therefrom [citations]. When there is a substantial conflict in the evidence, a determination of the controverted facts by the trial court will not be disturbed." (*California Water Service Co. v. Edward Sidebotham & Son* (1964) 224 Cal.App.2d 715, 734 (*California Water Service*); *Lubetzky v. Friedman* (1991) 228 Cal.App.3d 35, 39 (*Lubetzky*) [on appeal from an order involving a determination of a disputed issue of fact submitted on declarations, the declarations favoring respondents' position are accepted as true].)

"Questions of law are reviewed under a nondeferential standard, affording plenary review. [Citation.]" (*McGhan Medical Corp. v. Superior Court* (1992) 11 Cal.App.4th 804, 809.)

2. Justice Panelli's Failure to Try the "[E]ntire [A]ction"

Plaintiffs argue that because the jurisdiction of a temporary judge to try a cause derives from the parties' stipulation (*In re Brittany K.* (2002) 96 Cal.App.4th 805, 813), and because plaintiffs never agreed to trial of less than the "entire action" by Justice Panelli, he had "no jurisdiction to decide anything other than the entirety of this case."

We agree that a temporary judge has no jurisdiction to act absent agreement by the parties. (See, e.g., *People v. Tijerina* (1969) 1 Cal.3d 41, 48; *Kim v. Superior Court* (1998) 64 Cal.App.4th 256, 259-260.) We reject, however, plaintiffs' claim that they did not agree to have Justice Panelli decide less that the "entire action." As we have already discussed at length, the record reflects an understanding among Justice Panelli and counsel that the JAMS trial would not include plaintiffs' eighth cause of action which was then subject to a stay order, and that the *court* had retained jurisdiction over the eighth cause of action. The record further reflects that plaintiffs never asserted during the JAMS proceedings that they had a right to adjudication of all of their causes of action in the JAMS trial or that Justice Panelli's decision could be invalidated if he did not adjudicate the eighth cause of action. We, therefore, reject the contention that Justice Panelli was without jurisdiction to adjudicate fewer than all plaintiffs' causes of action.

3. Justice Panelli's Failure to Sign the Oath Prior to Commencement of Trial

Plaintiffs also contend the JAMS proceedings were jurisdictionally invalid by reason of Justice Panelli's failure to execute the oath of office before proceeding with the trial.

Article VI, section 21 of the California Constitution provides that, "[o]n stipulation of the parties litigant the court may order a cause to be tried by a temporary judge who is a member of the State Bar, sworn and empowered to act until final determination of the cause." Rule 244 sets forth specific procedures for the appointment of a temporary judge: "(a) . . . [T]he stipulation of the parties that a case may be tried by a temporary judge shall be in writing and . . . . must be submitted for approval to the presiding judge . . . . [¶] (b) . . . The order designating the temporary judge must be endorsed upon the stipulation, which must then be filed. The temporary judge must take

and subscribe the oath of office . . . . The oath . . . must be attached to the stipulation and order of designation, and the case will then be assigned to the temporary judge for trial. After the oath is filed, the temporary judge may proceed with the hearing, trial, and determination of the case."

Plaintiffs' argument conflates the constitutional requirements for serving as a temporary judge with the procedural specifications set forth in rule 244. They argue the *constitution* requires that an oath of office, executed in connection with the matter to be tried, must be taken and subscribed *before* the proceedings commence in front of a temporary judge. But the constitutional language itself does not specify the manner of compliance with its terms, and there is no authority to support plaintiffs' position that the constitutional provisions must be carried out in compliance with the rule. To the contrary, it has long been held that the provisions of rule 244 are neither mandatory nor jurisdictional. (*In re Richard S.* (1991) 54 Cal.3d 857, 860, 866.)

In *In re Lamonica H.* (1990) 220 Cal.App.3d 634, 638, for example, a litigant in a dependency proceeding challenged the power of a referee to act as a temporary judge in the absence of an agreement in writing. From what appears, none of the requirements of rule 244 had been satisfied. The court, however, rejected the contention that the provisions of rule 244 were either mandatory or jurisdictional. "[W]e find the failure to meet the requirements of rule 244 did not in and of itself prevent the referees from acting in this manner. . . . [T]he requirements of rule 244, while obligatory, may be given only directory effect." (*Lamonica*, at p. 645, fn. omitted.) In so concluding the court reasoned, "[w]here a party to a proceeding . . . has in fact expressly or impliedly agreed that the referee may sit as temporary judge pursuant to article VI, section 21 of the [California] Constitution, it is difficult for us to fathom what legitimate interest the party has in the method by which his agreement is memorialized. Whether consent is oral, written, express or implied, if in fact a party agrees to proceed before a referee and thereafter receives a ruling on the merits from the referee, his reasonable expectations have been fulfilled. Thus the detailed procedure set forth in rule 244 appears to us designed to serve collateral interests of the judicial system. . . . . By . . . requiring the

written approval of a supervising judge and an oath, the rule insures that the activities of temporary judges are monitored and do not impair the administration of the trial courts. These interests are entirely unrelated to [the litigant's] interest in having his dispute heard in a competent and unbiased tribunal." (*Id.* at p. 644.)

Similarly, in *City of Shasta Lake v. County of Shasta* (1999) 75 Cal.App.4th 1, 5 (*City of Shasta Lake*), the parties stipulated to have their case tried by a retired superior court judge, and agreed that his decision would " 'have the same force and effect as a Superior Court judgment and will be appealable as such.' " But the parties also described this arrangement as a " 'binding arbitration.' " (*Ibid.*) After the hearing was completed, the retired judge issued his decision which was filed as a " 'Judgment Following Arbitration.' " (*Id.* at pp. 9-10.) On appeal, the threshold question was whether the hearing before the retired judge was a trial or an arbitration. (*Id.* at p. 10)

The court determined that the hearing qualified as a "temporary judge proceeding" and was not an arbitration. (*City of Shasta Lake, supra*, 75 Cal.App.4th at p. 11.) The absence of an oath did not defeat this conclusion and was not considered to be a jurisdictional defect. The court concluded that the requirement of an oath could be satisfied by judicial notice of the fact that the retired judge had previously taken the oath of office, citing California Constitution, article VI, section 6, subdivision (e), "permitting assignment of retired judges by the Chief Justice, without requiring that they be sworn." (*City of Shasta Lake*, at p. 11, fn 6.)[20]

Plaintiffs nevertheless contend that "no person, not even a retired judge, can *constitutionally* (italics added) serve as a temporary judge, unless that person takes the required oath of office *before* (italics in original) conducting the trial," citing *In re*

[20] Plaintiffs criticize the court's reasoning, arguing that a temporary judge is not governed by the same provisions as an assigned judge. It is true that assigned judges are governed by article VI, section 6, subdivision (e) of the California Constitution, and temporary judges by article VI, section 21. It is likely, however, that the requirement of an oath was included in section 21 because under that provision "member[s] of the State Bar" who have never been sworn as judges are also empowered to act as temporary judges.

Marriage of Assemi (1994) 7 Cal.4th 896, 907-908 (*Assemi*); *Kajima Engineering and Construction, Inc. v. Pacific Bell* (2002) 103 Cal.App.4th 1397, 1400-1401 (*Kajima*); and *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 45 Cal.App.4th 631, 636 (*Old Republic*), disapproved on another ground in *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1361. None of these cases so holds.

In *Assemi*, a retired judge, who had been appointed to conduct an "arbitration," accepted and approved a settlement worked out by the parties prior to the hearing. (*Assemi, supra,* 7 Cal.4th at p. 902.) Neither party contended that the arbitrator had been acting as a temporary judge. (*Id.* at p. 908.) The Supreme Court nevertheless sought to ascertain the judge's precise role in order to determine whether the settlement agreement accepted and approved by the retired judge was enforceable pursuant to section 664.6, as one that had been made "before the court." (*Assemi,* at p. 906.) In keeping with the parties' understanding, the court noted that the record did not "reflect . . . that [the jurist] took an oath of office empowering [him] to act as a temporary judge, and this circumstance precludes his having served in that capacity." (*Id.* at p. 908.) The court concluded, however, that the judge had been "empowered to exercise what are essentially judicial functions" and, under the circumstances, the parties' settlement was deemed to have occurred in a " '*judicially supervised*' proceeding." (*Id.* at p. 909.) The court in *Assemi* did *not* consider the question presented here, which is, whether the absence of—or the posttrial subscription of—an oath of office relating to the assigned case, constitutionally incapacitates a temporary judge from acting as such.

Similarly, in *Old Republic*, the court was puzzling over a confusing stipulation in which the parties agreed to " '[b]inding [a]rbitration' " by a " 'Special Master' " who would " 'enter findings of fact and conclusions of law' " to be submitted to the court for review pursuant to the statutes governing review of arbitration decisions, but also provided that the court could make " 'changes or alterations to the findings of fact or conclusions of law entered by the Special Master.' " (*Old Republic, supra,* 45 Cal.App.4th at pp. 634-635.) In determining the proper scope of review of the special master's decision, the court first eliminated the possibility that the appointed judge was

acting as a "temporary judge"—and did so by noting that the record contained neither an approval of the special master's appointment by the presiding judge nor any oath of office. (*Id.* at pp. 636-637.) Again, the court did not consider or decide whether the absence—or late subscription—of an oath relating to the assigned matter, renders the decision of a temporary judge unconstitutional and void.

Finally, in *Kajima*, the court concluded that the assignment of a matter to a retired judge was manifestly a general reference pursuant to section 638 and, therefore, the absence of an oath was "beside the point." (*Kajima, supra*, 103 Cal.App.4th at p. 1400.) The court further noted, in responding to the appellant's arguments, that the absence of an oath constituted further support of its conclusion that the retired judge was not acting as a temporary judge. (*Id.* at p. 1402.)

In short, neither *Assemi* nor *Old Republic* nor *Kajima* addresses plaintiffs' contention here, that the failure to execute an oath and append it to the stipulation and order prior to commencement of the proceedings renders a temporary judge's decision constitutionally void as a matter of law.

4. Plaintiffs Waived the Requirement of the Oath

Even assuming an oath should have been executed prior to the commencement of the JAMS trial, the trial court found that plaintiffs waived that requirement. Because the parties dispute the events that transpired with respect to the oath, we review that question for substantial evidence. (*Lubetzky, supra*, 228 Cal.App.3d at p. 39.)

According to defendants: Plaintiffs prepared the final version of the stipulation and order for the JAMS trial, and did not include an oath. At that time, defense counsel was unaware of the requirement that an oath be appended to the appointment order. The need for the oath was brought to the parties' attention during the trial by Justice Panelli. Counsel for plaintiffs assured defense counsel that he would review the paperwork that had been provided by the JAMS administrator and "would promptly handle the matter." By the date set for closing argument, however, plaintiffs' counsel still had not done so. Defense counsel, therefore, prepared a new stipulation and oath of office. The new stipulation recited that Justice Panelli was appointed to decide all causes of action

"except those causes of action that have been stayed by prior order of the Court." The documents were presented to plaintiffs' counsel and to Justice Panelli on February 21, 2002, with a detailed cover letter which requested, inter alia, that plaintiffs' counsel sign and return the new stipulation, consent, and order. Shortly thereafter, Justice Panelli signed the oath, which was filed on March 15.[21] Plaintiffs' counsel never returned the stipulation and never returned the "nearly daily" telephone calls from defendants' counsel. Although plaintiffs' counsel was reached by phone on at least two occasions, he declined to speak with defendants' counsel and did not keep his promises to call back. Defendants' counsel was, therefore, unable to speak with plaintiffs' counsel from February 21 until March 18—the date set for trial in the event the JAMS trial had not been completed. On March 18, plaintiffs' counsel essentially admitted that he was attempting to forestall any decision by Justice Panelli until the backup trial date.

According to plaintiffs: Plaintiffs' counsel was unaware of the oath requirement until after the JAMS proceedings were completed and after he received Justice Panelli's statements of decision. Counsel *was* aware that during the JAMS proceedings there was discussion about new documentation, but he did not recall looking at the documentation during the proceedings and was never aware "exactly what new documentation Justice Panelli believed was needed regarding his appointment." Plaintiffs' counsel did not have any copies of the documentation proposed by the JAMS administrators or Justice Panelli, nor did he recall what the documentation was, as he was "busy trying a lawsuit." Plaintiffs' counsel did recall, however, that at several points during the proceedings Justice Panelli stated the parties needed to prepare a new order of reference, "in order to validate the proceedings." On the last day of proceedings, plaintiffs' counsel was still unaware that Justice Panelli's failure to sign an oath had "violated" the constitution. Plaintiffs' counsel never waived that defect "because, among other reasons, [he] was never aware of that constitutional defect until after the termination of the proceedings." Several days after February 18, 2002, counsel received a proposed new stipulation and

[21] It appears that the oath was signed on February 28, 2002, although the document also indicates the oath was subscribed and sworn on March 5.

concluded he would not sign it because the language stating that Justice Panelli would try less than the entire action was unacceptable. After the last day of the JAMS proceedings and before the statements of decision were issued, plaintiffs' counsel told defendants' counsel "several times" that he had "no intention of signing any new documentation."

On this disputed evidence, the trial court (Judge Quidachay) made the following findings: "The parties stipulated to use Justice Panelli as a private judge pro tem, and the Court duly appointed him. Further, when he learned that the parties[] had mistakenly failed to include his oath as an attachment to the order appointing him, Justice Panelli promptly endeavored to correct the error. When plaintiffs' counsel failed to cooperate in correcting that error, Justice Panelli duly signed an oath of office and had it filed with the Court. He did all of this before issuing his statement of decision. In attacking Justice Panelli for not signing the oath before the trial began, plaintiffs elevate form over substance and conveniently forget that the failure to secure the oath earlier was, at least in part, their own fault. Indeed, plaintiffs themselves were the ones who proposed using Justice Panelli to try this matter,[22] and the ultimate stipulation that was presented to the Court to appoint Justice Panelli was prepared by plaintiffs' counsel."

On these facts the court found that any jurisdictional challenge was waived. The court also ruled that Justice Panelli was qualified to try this matter, noting that the constitutional provision requiring an oath does not specify the "precise mechanism" for such oaths, nor does any law invalidate an oath signed after evidence is presented but before a decision is rendered. The court noted, further, that Justice Panelli is a "well known retired jurist" who signed an oath of office in another pro tempore trial only two months before the trial in this matter; thus there could be no "serious doubt that Justice Panelli was qualified to try this matter."

On this record we must affirm. There was a conflict in the evidence as to whether counsel were made aware during the JAMS trial that an oath was needed and whether plaintiffs' counsel refused to cooperate in correcting the error. This conflict was resolved

[22] This fact was included in defense counsel's declaration and was not disputed by plaintiffs' counsel.

in favor of defendants. There being substantial evidence to support that resolution, we are bound by the trial court's finding and any reasonable factual inferences that flow from it. (*California Water Service, supra*, 224 Cal.App.2d at p. 734.)

The trial court's decision is also legally correct. In *Fain*, the parties agreed to refer a matter for trial to a retired judge, but failed to satisfy most of the technical requirements of rule 244. After that trial was completed, the losing parties attacked the validity of the decision. The court concluded that the appellants, by their words and conduct, "clearly acted and behaved as though the matter had been transferred to [the retired judge] *for a trial.*" (*Fain, supra*, 75 Cal.App.4th at pp. 987-988, fn. omitted.) The proceedings, therefore, were "in legal effect, a trial on the merits by a temporary judge pursuant to article VI, section 21, of the California Constitution. . . . [and neither of the two appellants] ever contended otherwise until *after* [the temporary judge] issued his statement of decision." (*Id.* at p. 988.) The court concluded " '[W]e have ratified a line of cases recognizing that a valid stipulation for purposes of the constitutional provision may arise as a result of the *conduct* of the parties . . . .' [Citation.]" (*Id.* at pp. 988-989.) The court went on to state, "[t]his commonsense approach is based on the simple proposition . . . that '[a]n attorney may not sit back, fully participate in a trial and then claim that the court was without jurisdiction on receiving a result unfavorable to him.' [Citation.]" (*Id.* at p. 989.)

Plaintiffs contend the so-called constitutional defect "cannot be waived," citing cases that address the "analogous statutory requirements of . . . Section 638 and Rule 244." Putting aside the question of whether the provisions governing special and general references are "analogous" to those governing the appointment of a temporary judge, the cases relied upon by plaintiffs are inapposite. (*Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 710, 713-714 [mediation cannot be characterized as a general reference and that mischaracterization is not waived by party's participation in mediation]; *Aetna Life Ins. Co. v. Superior Court* (1986) 182 Cal.App.3d 431, 436 [participation in a special reference proceeding does not waive right to object to court's later erroneous treatment of referee's decision as a binding general reference]; *Thompson v. Municipal Court* (1958)

162 Cal.App.2d 676, 677-678 [judge's telephonic proposal to parties that matter be heard in his absence by clerk of the court as a referee had no basis in law; accordingly, it was a nullity that could not be validated by the parties' presentation of evidence to the clerk].)

The facts before us are distinctly different from those in the cases cited above, and remarkably similar to the facts in *Fain*. Here the court, as requested by the parties, appointed Justice Panelli to serve as a temporary judge for their trial. The trial took place, as requested, before Justice Panelli. At no time during the trial or prior to the issuance of Justice Panelli's decision did plaintiffs raise any objections to the proceedings, or to Justice Panelli's authority or jurisdiction, on procedural or constitutional grounds. Paraphrasing *Fain*: Justice Panelli, as a retired judge, clearly met the requirement of a sworn judicial officer and was empowered to act. Thus, all of the requirements of California Constitution article VI, section 21 were met. Justice Panelli was authorized—indeed required—to sign and file a statement of decision. He did so and no procedural error occurred. (*Fain, supra*, 75 Cal.App.4th at pp. 990-991, fn. omitted.)

C. Plaintiffs Were Not Prejudiced by the Order Granting Summary Adjudication of Plaintiffs' First Cause of Action

Plaintiffs' third contention on appeal is that the order granting summary adjudication of the first cause of action for breach of contract and rescission was erroneous and should be reversed. Specifically, plaintiffs contend defendants' motion did not refute one of the factual bases of that cause of action, i.e., that defendants violated the Major Decision clause of the Agreement.[23] Plaintiffs argue this constituted prejudicial error because "in the second trial Judge Ballati ruled that Defendants' $750,000 steel

[23] Plaintiffs actually argue that defendants' motion addressed "only one of the numerous factual theories pleaded by Plaintiffs . . . . [but] never addressed any of the other factual theories . . . , including the allegation that Defendants breached the Partnership Agreement by expending sums and incurring obligations in violation of the Major Decisions clause . . . of the Limited Partnership Agreement." (Emphasis omitted.) This argument implies that there were other factual theories that were not addressed by defendants' motion; whether or not this was the case, plaintiffs' argument on appeal focuses only on defendants' failure to address the allegation concerning the Major Decision clause and, accordingly, we analyze only that question.

purchase, in fact, did violate [the Major Decision] clause . . . . Consequently, by granting Defendants' . . . defective summary adjudication motion, the trial court erroneously precluded Plaintiffs from proving a pleaded basis for recovery under their breach of contract cause of action, which ultimately would have been successful."

As we will explain, due to the unusual procedural history of this case, plaintiffs were not prevented from proving this pleaded basis for recovery and, in fact, were given two opportunities to do so.

1. Procedural Background

The first cause of action in plaintiffs' second amended complaint was for "breach of contract" and sought rescission of the Agreement, as well as damages. In that cause of action, plaintiffs alleged multiple breaches of the Agreement, nearly all relating to defendants' failure to perform competent and timely construction management services. One subparagraph alleged, in addition, that defendants took actions that violated the Major Decision clause.

Defendants filed a motion for summary adjudication of the "First Cause of Action for Rescission." Defendants presented evidence that they were not obligated to provide construction management services under the Agreement, and that language proposing such an obligation had been deliberately removed from the Agreement during negotiations. Therefore, there could be no material breach and no ground for rescission.

Plaintiffs did not dispute these facts. Instead, they argued there was an overall contract, including an enforceable oral agreement, that defendants would provide construction management services for the project. No evidence or argument was submitted regarding plaintiffs' allegation that defendants had violated the Major Decision clause. Nor did plaintiffs argue—as they do now on appeal—that the motion should have been denied because defendants failed to refute this factual basis for the first cause of action.

The court (Judge Garcia) granted defendants' motion, concluding "[t]he undisputed evidence discloses that any agreement by defendant Doheny-Vidovich Partners or defendant John Vidovich to supply construction management services was *not*

part of the parties' agreement to form a partnership, and the alleged failure of defendants to supply construction management services thus cannot supply a basis for rescinding the written agreement that formed the parties' partnership." At most, the court ruled, plaintiffs presented evidence that shows "the parties reached a separate oral agreement after June 30, 1999 for Mr. Vidovich to supply some level of construction oversight. While the breach of any such separate agreement might give plaintiffs some legal rights, it cannot entitle them to rescind the June 30, 1999 agreement that formed the partnership in the first place."

Two weeks later plaintiffs filed a motion for reconsideration and, in the alternative, for leave to file a fourth amended complaint to allege such a separate agreement. The court denied reconsideration but granted leave to amend. Plaintiffs' third amended complaint alleged a cause of action for "Breach of Implied In Fact Contract" and then simply repeated the factual allegations of the first cause of action in the second amended complaint, including the allegation that defendants breached the Major Decision clause.

This was the operative complaint upon which the parties proceeded to trial before Justice Panelli. At the close of that trial, plaintiffs requested leave to amend the complaint to conform to proof, seeking to add a cause of action for breach of the partnership agreement. That proposed cause of action alleged, inter alia, that defendants violated the Major Decision clause by "[e]ntering into a construction contract for the purchase of steel pilings for the project with a value in excess of $10,000, without the approval of Plaintiff[s]." In support of the motion, plaintiffs asserted that "[t]he evidence relating to these allegations all has been introduced exhaustively by the parties as a result of Plaintiffs' first cause of action for breach of an implied-in-fact agreement . . . . That cause of action, originally pleaded as a breach of an integrated agreement, included each of these issues. *All of the conceivable evidence relating to these issue[s] has been introduced at trial*." (Italics added.)

Justice Panelli thereafter issued his statement of decision. With respect to the disputed steel purchase, he found, on conflicting evidence, that plaintiffs had not proven

fraudulent concealment of the steel order. Specifically, the court found: "[Vidovich] copied the steel order to Kulkin [plaintiffs' agent] and only placed it after Kulkin expressed concern about getting steel for the project on time. While Kulkin testified that he only asked Vidovich to order steel for a 'test pile program' and denied that he agreed to the steel order, the evidence does not support Kulkin's assertion, since all of the project budgets that Kulkin prepared showed that the foundation pilings would be driven immediately after the test pile program was completed. Regardless of whether a test pile program was used, the steel needed to be ordered at one time."[24]

Justice Panelli also denied plaintiffs' motion to amend the complaint to conform to proof, stating that "the allegations of the proposed amendment had not been proven by a preponderance of the evidence and hence any amendment would be an idle and useless act."

Three years later, in the trial on the accounting cause of action, plaintiffs introduced an entirely new round of evidence to prove that the purchase of the steel pilings violated the Major Decision clause. The court agreed and adjusted the accounting accordingly.

2. Legal Analysis

It is well-settled that a judgment entered after trial will not be set aside on the basis of a prior, erroneous denial of a motion for summary judgment, unless that error resulted in prejudice to the defendant. (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833.) The reasoning underlying the rule is this: "When the trial court commits error in ruling on matters relating to pleadings, procedures, or other preliminary matters, reversal can generally be predicated thereon only if the appellant can show resulting prejudice, and the probability of a more favorable outcome, *at trial*. Article VI, section 13 [of the California Constitution], admonishes us that error may lead to reversal only if we are persuaded 'upon an examination of the entire cause' that there has been a miscarriage of justice. In other words, we are not to look to the particular ruling complained of in

[24] Plaintiffs' agent's name was misspelled by Justice Panelli; the correct spelling is Kuklin.

isolation, but rather must consider the full record in deciding whether a judgment should be set aside. Since we are enjoined to presume that the trial itself was fair and that the verdict in plaintiffs' favor was supported by the evidence, we cannot find that an erroneous pretrial ruling based on declarations and exhibits renders the ultimate result unjust." (*Ibid.*)

This rule ordinarily would not pertain where there has been an erroneous *granting* of a motion for summary adjudication because, in the usual case, such an order would nearly always result in prejudice by precluding the losing party from litigating the issue decided in the motion for summary adjudication. But this is not the usual case. Here, plaintiffs were granted leave to amend their complaint after the court granted defendants' motion for summary adjudication, and plaintiffs were permitted to reallege the factual allegations in the subsequent amended complaint, including the claim that defendants had violated the Major Decision clause of the Agreement. The same allegation was made as a factual basis for the fraud cause of action. This factual claim was tried to Justice Panelli, and plaintiffs themselves asserted that "[a]ll of the conceivable evidence" relating to this issue was presented. On conflicting testimony, Justice Panelli found the allegation had not been proven, either as the basis for the fraud cause of action or as the basis for the contract cause of action. Plaintiffs do not argue that Justice Panelli's findings were not supported by substantial evidence. We are, accordingly, bound by these findings.

Plaintiffs were fortunate to have a second bite at the apple in the accounting trial. There, they introduced substantially more evidence to support their claim that defendants had violated the Major Decision clause by ordering the steel pilings without plaintiffs' approval, and succeeded in recapturing more than $165,000 for the partnership from defendants. Plaintiffs argue this demonstrates they were prejudiced by the granting of the summary adjudication motion. On this record, we conclude it demonstrates only that plaintiffs improved upon their evidentiary presentation at the second trial.[25]

[25] Plaintiffs also contend that the summary adjudication motion was erroneously granted because plaintiffs raised a triable issue of material fact, viz., whether Vidovich had agreed to act as construction manager for the project. But the court's ruling resulted

D. Plaintiffs Have Waived Their Claim Regarding Denial of Leave to File a Fourth Amended Complaint by Their Failure to Cite to Any Evidence in the Record

Plaintiffs' final contention is that Justice Panelli erred in denying plaintiffs' request for leave to file a fourth amended complaint to conform to proof. It will be remembered that Justice Panelli denied the request on the ground, inter alia, that plaintiffs had failed to prove the allegations contained in the proposed new cause of action. Plaintiffs take issue with that ruling on the *sole* basis that it is demonstrably wrong because Judge Ballati, in a subsequent trial, found one of the same allegations (breach of the Major Decision clause) *had* been proven.

The contention is utterly specious. A finding by a judge in one proceeding cannot be considered error based on a contrary finding by another judge after an entirely different proceeding.

Plaintiffs have provided no citations to the record of the trial before *Justice Panelli* to support their claim that the amended complaint should have been permitted. The issue is, therefore, waived. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.)

III. DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

RIVERA, J.

We concur:

REARDON, Acting P.J.

SEPULVEDA, J.

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in no prejudice because plaintiffs thereafter filed the third amended complaint, containing the same *factual* allegations as a basis for the first cause of action (breach of implied-in-fact contract), which was fully litigated in the JAMS trial.